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COMPETITIVE COMMUNICATIONS GROUP

October 29, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

FCC Secretary Magalie Roman Salas
Federal Communications Commission
445 12th Street S.W.
Washington D.C. 20554

Dear Secretary Salas:

Attached herewith for filing, please find an original and twelve (12) copies of Competitive Communications Group, LLC and participating commentors comments regarding FCC 99-206, Fifth Report and Order and Further Notice of Proposed Rulemaking.

Electronic Comments have been filed in the Matter of:

Access Charge Reform	)	CC Docket No. 96-262
Price Cap Performance Review for Local Exchange Carriers	))	CC Docket No. 94-1
Petition of US West Communications, Inc. For Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA	))))	CC Docket No. 98-157

Paper copies are required to be filed in the Matter of:

Interexchange Carrier Purchases of Switched Access Services Offered by By Competitive Local Exchange Carriers	)))	CCB/CPD File No. 98-63

Respectively submitted,

Douglas A. Dawson, Principal
Competitive Communications Group, LLC

Attachment

CALVERT METRO BUILDING 6811 KENILWORTH AVENUE SUITE 302 RIVERDALE, MARYLAND 20737
PHONE 301-699-5300 FAX 301-699-5080

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Access Charge Reform	))	))	CC Docket No. 96-262
Price Cap Performance Review for Local Exchange Carriers	))	))	CC Docket No. 94-1
Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers	))	))	CCB/CPD File No. 98-63
Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA	))	))	CC Docket No. 98-157

Comments of Competitive Communications Group, LLC

Competitive Communications Group, LLC (CCG) and the participating commentors (Companies) shown in Attachment A respectfully submit these comments in response to the Commission's Fifth Report and Order and Further Notice of Proposed Rulemaking (Order or NPRM) in the above-referenced proceeding.[1] CCG and the Companies are filing these comments for the limited purpose of addressing the questions posed by the Commission in regard to competitive local exchange carrier (CLEC) access charges.[2] CCG is a telecommunications consulting firm providing financial, regulatory, and specialized consulting services for telecommunications carriers, including CLECs, and the Companies are or in the process of becoming CLECs.

In the Order, the Commission explains that it is initiating a rulemaking to examine CLEC originating and terminating access rates because the Commission committed to a review of the issue if there is evidence that CLECs were imposing unreasonable terminating access charges.[3] The Commission

[1] *In the Matter of Access Charge Reform,* Fifth Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, FCC 99-206, (released August 27, 1999) (NPRM).
[2] *See* NPRM Section VIII. E.
[3] *See* NPRM at 99, ¶189.

also states that a number of commentors have pointed out inaccuracies or inconsistencies in comparisons provided by AT&T in its *Petition For Declaratory Ruling*.[4] We do not believe that the Commission has sufficient factual proof of unreasonable CLEC access charges to warrant a rulemaking. It would be inappropriate to regulate an entire industry segment because suggestions have been made that there are a few "bad apples" without proof of systemic and widespread abuse. Imposition of cost justification or burdensome filing requirements is a step backwards.

As discussed in these comments, most of the options addressed by the Commission in the NPRM would result in the imposition of significantly expensive and administratively burdensome regulations for CLECs. CCG does not believe that the majority of CLECs are attempting to demand unjustified and unreasonable access charges. CCG supports the Commission's conclusion that a market-based solution is the appropriate regulatory response. As the Commission states, pro-competitive and de-regulatory national policies are embodied in the Telecommunications Act of 1996.[5] New regulatory requirements for CLECs would only add new barriers to market entry, which would serve to inhibit the growth of competition, and such a drastic step is not required to effectively address these issues. There are numerous incentives for reasonable CLECs and reasonable IXCs to develop joint compromise solutions rather than face the consequences of informing customers that they would have to choose one provider over the other because the two parties cannot agree on rates. Under the Telecommunications Act of 1996 (Act)[6], the Commission is charged with the responsibility for determining the reasonableness of carrier's access charges, and the Commission's complaint process is the appropriate avenue for the Commission to make this determination where actual cases of imposition of unjustifiable access charges can be shown. However, many of the Commission's proposals in the NPRM would give IXCs the ability to unilaterally allege that a CLEC's access charges are unreasonable simply because they do not want to pay these

[4] *See* NPRM at 97, ¶187.
[5] *See* NPRM at 4, ¶1.
[6] 47 U.S.C. §205.

charges. As long as safeguards are present to prevent abuses by CLECs, prevent anti-competitive practices by IXCs, and protect the end user, market-based solutions should be sufficient to prevent unreasonably high rates while affording competitors the flexibility to meet business goals. If IXCs are allowed to decline a CLEC's access service, safeguards must be established to prevent IXCs from discriminating against providers in the same service areas, and rules are needed that define specific responsibilities in the case of cancellation of access service. IXCs should be responsible for providing adequate advance notice to the CLEC, and requirements should be established to provide specified information to customers concerning the IXC's business decision and options available to the customers.

In the NPRM, the Commission poses questions concerning any statutory or regulatory constraints that prevent an IXC from declining a CLEC's access service, and the ramifications of cancellation for CLEC customers[7]. A number of provisions in the Act impose obligations on IXCs in regard to provision of their services to end users and their duty to interconnect with other carriers. Under the Act a common carrier is defined as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio…".[8] A duty is imposed on every common carrier engaged in interstate or foreign communication "to furnish such communication service upon reasonable request therefore…".[9] In addition, telecommunications carriers are required "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[10] These provisions clearly prohibit IXCs from declining a CLEC's access service in cases where an IXC's refusal to obtain access would affect the CLEC's relationship with an end user customer, or where the IXC's action constitutes discriminatory or anti-competitive behavior.

If a CLEC's customer has a contractual relationship with an IXC, it is the IXC's responsibility to obtain the means to provide its services to that customer. However, IXCs cannot be permitted to place the

[7] *See* NPRM at 122, ¶242.
[8] 47 U.S.C. §153(10).
[9] *See* 47 U.S.C. §201(a).
[10] *See* 47 U.S.C. §251(a).

customer in a bind and influence the customer's relationship with a CLEC by refusing to obtain or refusing to pay for the CLEC's access services. This opens the door to discriminatory and anti-competitive practices by IXCs, many of whom are also entering the local exchange market as CLECs. Of particular concern is the fact that the largest IXCs, AT&T, MCI/WorldCom, and Sprint are also entering the local CLEC market. If these large carriers are allowed to keep their long distance customers from choosing other CLECs, then the ability of other CLECs to gain customers will be incredibly diminished. Those few carriers comprise a clear long distance oligopoly, and discrimination by these few carriers against CLECs would be clear abuse of oligopoly power. At a minimum, IXCs who are also CLECs, either directly or through another subsidiary, should not be able to block their subscribers from choosing other CLECs. Otherwise, all of the Commission's work to ensure equal access will have been in vain.

CCG believes it would impede the growth of competition if requirements are established that limit the flexibility of local providers to deploy and market their services. However, we hesitate to believe that all IXCs should be subject to mandates to accept traffic from all providers in an area in all cases. As long as rules are in place to protect from abuse by the oligopoly IXCs, then we believe there are several other rules that make sense for other IXCs. First, an IXC should be required to accept traffic from all CLECs within the switching domain of a given toll tandem. IXCs currently order access at RBOC or other LEC tandems, and we think by placing an access order with one LEC that they are agreeing to serve end users at end offices in that area. It seems anti-competitive if end users within a given end office cannot choose among competing CLECs in the area because an IXC chooses not to deal with all local providers at a given tandem office. This would limit end user choice and flies in the face of the Commissions intentions to foster local competition in the Act. IXCs , as providers of long distance services, should not be able to directly impede competition among local providers – or all of the work of the Act will have become undone. This suggests that IXCs, who have been pushing for years for equal access in the long distance arena now want a closed market in the local arena. Again, we believe the Commission has done a great job of fostering local competition and IXCs should not be able to undo all of the Commission's work simply by refusing to order access with CLECs. However, we do not believe a CLEC should be able to require an IXC to provide service in an area where the IXC does not currently serve. Secondly, in the situation where an IXC's customer connects to a CLEC, such connection should be considered *de facto* proof of interconnection between the two parties and the IXC should be required to pay the access rates of the CLEC or inform the customer that the IXC does not choose to continue providing its services to the customer. The current situation where AT&T and others are refusing to pay for access while still using such access cannot be allowed to stand.

In regard to termination of IXC traffic, the ability of an IXC to cancel terminating access would affect the integrity and ubiquity of the public switched telephone network. One of the basic tenets governing our nationwide network is that all carriers are connected to each other. Should an IXC cancel terminating access, then customers of CLECs would not be able to receive calls from customers of the IXC who cancelled service. This would result in degradation of the quality of the CLEC's service and penalize all end users of the IXC since they would not be able to call any customers of the CLEC. We believe it is a very dangerous precedent and would begin to balkanize the network, which would be detrimental to the concept of universal service. When a caller places a call he has no way of knowing if the party he is trying to reach is a CLEC customer, and users should not be penalized due to an IXC's unilateral refusal to interconnect.

One of the options suggested by the Commission is that IXCs should be allowed to offer different long distance rates within the same geographic area, depending on the access rates of the LEC or CLEC serving the end user.[11] This solution is ripe for abuse. Most IXCs do not offer only one rate for all end users. When an IXC sells to a business customer, they usually have a range of multiple rates and plans to offer to the customer. CCG fears that IXCs could attempt to influence customers' choice of a local service provider by "redlining" CLEC customers – i.e. not offering the lowest rate plans to an end user

[11] *See* NPRM at 123, ¶245.

and blaming the CLEC. Yet the IXC will not be truly "passing on" higher access rates, but rather using the CLEC's rates as an excuse to sell one of their more expensive plans to such a customer. In the case where IXCs are also CLECs, as is AT&T, IXCs could also use such a ruling as a weapon to discredit their competitors, even in cases where the competitor does not have excessively high access rates. The proposed solution merely offers advantages to the large players who are both CLECs and IXCs to the detriment of small CLECs. Given the potential for abuse, other solutions should be considered by the Commission.

In the past, the Commission has very judiciously decided against toll rate deaveraging for a variety of very good reasons. CCG does not believe that differences in access rates between carriers in the same market is a situation that alters the basis for the Commission's previous decision.

The Commission also asks if mandatory detariffing of access services would be an adequate market-based solution.[12] There are practical reasons why this is not an appropriate solution. First, this creates a market entrance barrier for new CLECs. There are literally thousands of IXCs in the country, all with the potential to terminate calls to a given CLEC, and a large number of IXCs in a typical market with the ability to originate long distance from customers of a given CLEC. Requiring CLECs to track down, and negotiate with, each individual IXC would create a prohibitively expensive and time consuming regulatory hurdle, and would seriously delay the launch date for a new CLEC. This would be a massive overreaction to a relatively small problem and would create larger problems than it would solve. Many CLECs are starting out as small businesses with limited funds and significant financial requirements while many IXCs are also small players. We need rules that encourage new players to enter the market, not rules that discourage entry. Additionally, many IXCs are also CLECs or will be competing against CLEC long distance offerings. In many instances it is the IXC, not the CLEC, that has significant bargaining power in negotiations. Such IXCs would have the ability to disadvantage a competing CLEC by delaying or refusing to negotiate a required interconnection agreement, or by demanding substantial concessions from the CLEC. This would result in potentially significant legal expense or lost business for a CLEC.

In practical terms, requiring a CLEC to have an agreement with an IXC before a customer of the IXC can sign up for the CLEC's service would complicate a CLEC's life beyond reason. A CLEC cannot anticipate all of the IXCs who might originate traffic in his market, so a CLEC would be faced with trying to sell to customers only to discover there is no access agreement with the IXC of that customer. Such a sale is certainly going to be greatly delayed, or more likely lost, while the CLEC hunts for and tries to negotiate with the IXC.

One additional problem with the detariffing of access rates, and instead requiring contractual relationships, is that such a ruling would not also apply to the States. We envision a scenario where contracts are required for interstate access and tariffs are required for State access. Such a system would impose the maximum possible cost and regulatory burden on a CLEC who would have to negotiate individual contracts and also prepare tariffs. There must be a simpler solution.

The Commission explores several potential regulatory responses if the market fails to constrain CLEC access rates. These include 1) submission of cost support where the CLEC's rates are higher than the incumbent LEC's rates, 2) comparing CLEC rates to incumbent LEC rates or to a benchmark to determine reasonableness; or 3) requiring CLECs to charge the higher rate to its own end users.[13] CCG believes that these types of options constitute *de facto* rate regulation. There is an underlying presumption in the Commission's questions that CLECs should not have access rates that are higher than those of the incumbent LEC. This also implies that CLECs should have lower costs. We point out that CLECs come in an amazing variety of sizes and types, and there are a number of reasons why a CLEC might have higher costs than the incumbent LEC:

12 *See* NPRM at 123, ¶246
13 *See* NPRM at 124-125, ¶¶247-249.

Economy of Scale. We want to dispel the notion that all CLECs are large and that they should automatically have costs lower than those of the incumbent LEC. All CLECs are not cherry-picking, large business customers in downtown metropolitan areas. Many CLECs have very modest business plans and expect to gain only a few thousand access lines, or even less, when fully mature.

Rural CLEC. LEC access charge rates are averaged statewide and across all classes of end user customers, which means these rates are also blended across both rural and urban areas. We know, through years of studying large and small companies, that costs are generally far higher in rural areas than in urban areas. A CLEC operating in a rural area might well have costs far above the statewide average access cost of the incumbent RBOC. In fact, if an RBOC were required to calculate costs separately for urban and rural areas, they would also show much higher rural access costs than urban access costs. Arguing that a CLEC should limit access charges to the statewide average rate of the incumbent LEC ignores the fact that CLECs have different cost structures and will only serve to impede fruitful competition in underserved rural areas. While requirements to file cost support would impose significant additional cost and regulatory burdens on CLECs, we reluctantly think that such filing must be allowed if serious consideration is given to the concept of limiting small or rural CLECs' rates to statewide average ILEC access charge rates. The Act is intended to foster competition everywhere, not just for urban business customers. A policy that would force all CLECs to cap access rates at incumbent levels would squelch competition for many classes of end user customers. CCG represents many CLECs who are beginning to chip away at the smaller remote markets and they must retain the flexibility to meet the dual goals of pricing their services competitively and recovering their costs.

Overpriced UNEs. CCG believes that Unbundled Network Element (UNE) loops are currently overpriced, which means CLECs who provision service with UNEs have higher than necessary costs by definition. State Commissions were originally tasked with setting the prices for UNE loops, and many of them have set them at rates that we are certain are above cost. In the almost every state, the cost of an unbundled voice loop is considerably higher than the cost of basic residential service, a bundled service that uses the loop as only one component of provisioning service. If the Commission imposes cost standards on CLECs, competitive parity mandates that LECs should be required to price UNE loops at cost as defined by the Act. CCG was hopeful that when the Supreme Court remanded UNE pricing decisions back to the Commission rather than to the States that we would see a reduction in loop costs. However, we have yet to see any move in that direction. Requiring CLECs to pay high UNE rates while proposing to limit their access charge rates to equal RBOC rates will mean many CLECs will be unable to effectively compete. If the Commission is going to limit CLEC access rates then it is only fair that the issue of high loop rates also be addressed concurrently – from the perspective of a CLEC's financial viability the two issues go hand-in-hand.

Lifecycle Timing. As brand new entities, CLECs have substantially higher costs and serve a smaller customer base than their ILEC counterparts. CCG has prepared a large number of business plans for startup CLECs, and our experience is that substantial capital investments and significant outlays for startup and operational costs are required in the first few years of business. Such a startup company could easily cost-justify relatively high access costs and rates in the early years, just because they are in the startup mode. These and other associated dilemmas would have to be addressed if a mandatory cost support filing is required. At what point in time does a CLEC become mature? How do you calculate costs for a new company with high costs but little demand? How do you determine costs for a company before they get their first subscriber?

There are also a number of pragmatic questions related to the determination of costs for CLECs, which would have to be considered if cost standards were required to support CLEC access rates.

These include:

- The Commission has created no accounting standards for CLECs. Nearly every CLEC has developed a unique chart of accounts and would have to incur additional costs in order to conform to a specific cost methodology, or else the Commission would have to consider adoption of standardized accounting rules for CLECs. In either case, this would result in significant additional regulatory burdens for CLECs.
- What type of costs should be used to support CLEC access rates? Non-price cap ILECs have the choice of using historical costs or using future costs with a true-up, both based on fully embedded costs. Would this also be acceptable for CLECs?
- ILECs are subject to rules concerning jurisdictional separations and the allocation of costs between subsidiaries that affect the determination of access costs. Since CLECs are not automatically subject to these rules, procedures prescribing standardized methods for the separation of costs would have to be imposed to create consistent methodologies for all CLECs. This is even more critical in the case of CLECs, because many of them are part of companies that have a completely different structure than typical telephone holding companies, and separating costs from disparate lines of business such as electric, cable TV, Internet Service Providers, wireless providers, newspaper publishing, and a host of other types of endeavors must be taken into consideration.
- Who would review such studies, and how long would it take for a review? In what time frames could the result of such studies be used for ratemaking? What would a new CLEC charge until costs were approved? Would a retroactive true-up of costs be allowed? An entire set of procedural rules would be required if cost support requirements were imposed on CLECs.
- How would any Commission cost methodology affect State access charge rates?

CCG sees no reason to tie CLEC rates to incumbent LEC rates since CLEC operations are not comparable to ILEC operations. Application of benchmarks to CLEC rates implies that CLECs have similar underlying cost characteristics to the RBOCs. As demonstrated previously in these comments, we know this is not true. Benchmarks make no sense as a practical solution to apply against such a diverse lot as CLECs, and if applied, would be nothing but a political solution superimposed upon a very diverse industry. CLECs have been set free to find unique solutions in order to provide competitive alternatives to customers, and they have found an incredible array of solutions. There are a number of reasons why CLECs have different operating characteristics:

CLECs come in different sizes. Benchmarks make no sense if you try to impose them on all CLECs. No benchmark makes sense for both AT&T/TCI and for a small CLEC who overbuilds in a tiny residential farming community. It is important to remember that not all CLECs are cherry-picking large business customers in big cities.

CLECs have developed incredibly varied solutions to reach customers. CLECs come in many varieties, and with vastly different underlying costs to provide service. We can think of no benchmark that makes sense when applied to all of these types of CLECs. Some of the many CLEC business plans:

Fiber / Copper Overbuild. Some CLECs have constructed fiber rings and are serving customers directly on their own copper facilities.

Unbundled Loops. Many CLECs are buying RBOC UNE Loops and bridging them back to their own switch.

Hybrid Fiber Coax (HFC). A number of CLECs are overbuilding towns with HFC facilities and providing telephone service, cable TV, and high speed internet access on the same facilities.

Wireless Loops. A number of the winners of the Commission's recently auctioned LMDS licenses are beginning to offer CLEC service using wireless loops.

Provision with UNE P. Some of the RBOCs are allowing a CLEC to buy unbundled network elements and rebundling them to create an end-to-end service using all RBOC facilities.

Voice over DSL. A new innovation is to supply voice along with high speed Internet access on one pair of copper.

Voice over IP. Some CLECs are using the Internet and the Internet protocols to transport voice between switches as a transport saving.

Total Utility Overbuild. Another plan is to overbuild new communities to offer telephone, cable TV, gas, electric, water and burglar alarms.

Data. Some CLECs are primarily supplying data services, but may also offer voice and long distance in order to provide full service to customers.

The Commission also suggested that any access charges greater than the RBOC rates be passed on to end users.[14] We have a problem with any concept of arbitrarily charging access costs to end users. CLEC prices are not regulated, but are market-driven. Thus, shifting any excess rates to CLEC end users is paramount to regulating CLEC rates and asking the CLECs to absorb the difference since they will not be able to charge any more than market prices.

The Commission also questions if an "end user pays" theory would represent an appropriate solution. CCG has a number of concerns about this concept.[15] First, there is often no way that an originating customer can know that he is calling a CLEC customer, and thus it seems unfair that the originating customer should be required to pay an additional charge for such a call. Application of such a concept would result in customer confusion, limit customer choice, and distort the market by putting the burden of payment for access on the end user, not the actual wholesale user of the service, the IXC. Also,

[14] *See* NPRM at 124, ¶249.
[15] See NPRM at 125, ¶249.

we do not know of a reasonable mechanism to pass such costs on to the originator. Any possible mechanism would be administratively burdensome and costly.

In regard to the Commission's questions concerning terminating access rates that are higher than originating rates, and treating "open end" originating access minutes as terminating minutes,[16] CCG believes that the same rationale for allowing higher terminating rates for independent LECs applies in the case of CLECs, and no reasonable basis exists for treating CLECs differently. There is also no persuasive rationale for treating "open end" originating access minutes as other than terminating minutes.

Conclusion

CCG and the Companies favor allowing IXCs to cancel service with CLECs in some instances, but safeguards should be established to ensure that CLECs and end users are protected. We believe that when confronted with the ugly situation where an end user would have to choose between two providers for service, most reasonable CLECs and IXCs will find some solution, short of losing the customer. After all, one likely scenario in this case is that customers would drop both parties. We do not believe that the largest IXCs who are also CLECs, with their oligopoly power in the long distance business, should be able to cancel service with a CLEC. If they have such an ability, then the large IXC/CLECs will be able to pick and choose which other CLECs will survive – that is handing the development of the local market over to the IXCs.

The Commission has very carefully fostered a set of rules to allow CLEC entry into the market, and the fruits of these rules are finally being realized in many communities in the US. It is very dangerous to erect hurdles in the path of competition if some other method will work. In almost every other area concerning CLECs, the Commission has consistently chosen to let the market drive the process. With some simple rules to protect the interests of end users, the market will also work here. CLECs with truly unreasonable rates will be bypassed, so their business will suffer if they refuse to lower

[16] See NPRM at 126, ¶253, and at 128, ¶255.

rates, and the Commission's complaint process provides a venue for the Commission to make a determination in the isolated cases where true abuse exists. IXCs will be reluctant to cut off end users unless the CLEC's rates are truly burdensome. This represents a workable solution that will continue to foster the goals of the Act and encourage the growth of competition.

Respectfully submitted,

By: ______________________

Doug Dawson
Principal
Competitive Communications Group
6811 Kenilworth Avenue, STE. 302
Riverdale, Maryland 20737
Ph.: (301) 699-5300
Fax: (301) 699-5080

ATTACHMENT A

PARTICIPATING COMMENTORS
NPRM ACCESS CHARGE ISSUE
Submitted by Competitive Communications Group

David Butler
President
aXessa
1340 Poydras Street
New Orleans, LA 70112

Robert Nyswaner
Senior Vice President
Electric Power Board of Chattanooga
536 Market Street
Chattanooga, TN 37402

Patrick Eudy
Vice President – Business Development
Fairpoint Communications
521 East Morehead Street
Suite 250
Charlotte, NC 28202

Nicholas Alger
Operations Manager
NTCNet Telecom, Inc.
P.O. Box 201
Bridge Street
Newport, NY 13416

Alan Terrell
President
RTC Communications Corp.
117 West Eighth Street
P.O. Box 507
Rochester, IN 46975

Gerald Taylor
General Manager
SNG Communications, LLC
1720 Fifth Avenue
Moline, IL 61265